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SCHOOL CHOICE UNDER THE NO CHILD LEFT BEHIND ACT: ISSUES AND IMPLICATIONS FOR STUDENTS WITH DISABILITIES

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The No Child Left Behind Act ("NCLB"),[1] signed into law on January 8, 2002, is hundreds of pages long and several inches thick. It amends, reauthorizes and creates a number of other "Acts" related to elementary and secondary education, chief among them the Elementary and Secondary Education Act of 1965 ("ESEA"). The ESEA itself addresses a myriad of education issues and programs including what is widely known as "Title I." Title I of the ESEA, and Title I programs, were first established in 1965. Under Title I, federal funds flow to the state educational agency, then to local school districts, and then to individual schools based on the number of low-income students, to boost the academic achievement of low-income, educationally disadvantaged students.

Title I has been amended a number of times, including most recently by NCLB. The amended Title I mandates a system for holding states, school districts and individual schools accountable for student achievement that is in many ways the centerpiece of NCLB. The school choice provisions of NCLB discussed below are part of the school-level component of this accountability system, and apply to schools that receive Title I funds. This issue paper begins with a brief discussion of *when* school choice kicks in under NCLB, followed by a detailed discussion of the legal requirements that apply once this occurs. It then considers issues and implications for students with disabilities.

The "When" of School Choice – Failure to Make Adequate Yearly Progress

The Title I accountability system begins with a system of academic content and achievement standards and assessments set by the state for *all* students – not merely those participating in Title I programs.[2] The assessments must be aligned with the standards, and assess for three levels of achievement – "basic," "proficient," and "advanced." *All* students in the state must be assessed, and assessment results must be disaggregated at the state, district and school levels by gender, major racial and ethnic groups, limited English proficiency, migrant

status, disability, and status as economically advantaged.[3] School districts and individual schools must make what NCLB terms "adequate yearly progress," or "AYP," towards ensuring that all students achieve at least the "proficient" level on the state assessments by the 2014-2015 school year. Each state sets the standard for what constitutes "proficient," and defines "adequate yearly progress," subject to certain requirements set out in NCLB and approval by the U.S. Department of Education.

If a Title I school fails to make adequate yearly progress for two consecutive years, the local educational agency ("LEA") must identify it for "improvement."[4] Being or remaining in this status triggers a graduated scheme of consequences for schools and their students. Among the first of these consequences is a limited form of public school choice.[5]

School Choice Under Title I

1. Basic Obligation and Exceptions

When a school is first identified for improvement, the LEA must provide all students enrolled in the school with the option of transferring to another public school served by the LEA, effective at the start of the new school year.[6] Schools offered as a transfer option may *not* themselves have been identified for improvement, corrective action or restructuring, or be "persistently dangerous" under NCLB.[7] An LEA may decline to offer this transfer option only if state law prohibits choice through restrictions on public school assignments or the transfer of students from one public school to another.[8]

Regulations promulgated by the U.S. Department of Education further provide that neither lack of capacity nor the requirements of a voluntary or court-ordered desegregation plan are valid reasons for failing to provide a transfer option.[9] Indeed, the regulations and Department of Education policy require an LEA to return to court to seek changes in an otherwise necessary, valid desegregation plan.[10] In regard to lack of capacity, the Department has stated that "the statute requires an LEA to take measures to overcome issues such as overcrowding, class size limits, and health and safety concerns, that otherwise might prevent the LEA from complying with...public school choice requirements."[11] The statute itself, however, allows an "out" for districts in which all schools to which a child might transfer are in improvement, corrective action or restructuring. Under such circumstances, the LEA is to establish a cooperative agreement with other LEAs in the area for a transfer, but only "to the extent practicable."[12] In regard to other situations in which it is impossible for an LEA to offer the option to transfer to another public school within the LEA – such as where there is only one school in the district, or in very isolated areas – the Department has suggested as a discretionary policy matter (but not as a legal requirement) that the LEA provide students with supplemental services instead.[13]

In administering its choice program, the LEA has an overarching obligation to give priority to the lowest achieving students from low-income families in addressing the myriad

implementation issues that may arise (e.g., who gets their first choice of transfer schools, who gets transportation when funding is inadequate to provide transportation for all, etc.).[14] For students protected by the Individuals with Disabilities Education Act ("IDEA") or Section 504 of the Rehabilitation Act, the public school choice option offered must provide a free appropriate public education ("FAPE") as defined by IDEA or the Section 504 regulation (34 C.F.R. §104.33), as the case may be.[15] At the new school, all transferring students must be enrolled in classes and other school activities in the same manner as all other children at the school.[16]

2. Number of Options Required

The Title I statute requires that students be provided "*the* option to transfer to another public school...." (emphasis added).[17] It does not specify *how many* options must be provided. The regulations, too, are ambiguous, but somewhat less so. Under the regulations, if there is more than one school in the LEA that meets the relevant requirements for being a transfer option – i.e., there is more than one school that has not been identified for improvement, corrective action or restructuring, and is not "persistently dangerous" – the LEA must offer a choice of more than one school.[18] It must also take into account a parent's preferences among the choices offered.[19]

3. Transportation

The LEA must provide or pay for transportation to the new school, subject to a spending ceiling set out in the statute.[20] Spending beyond the ceiling is discretionary, creating the risk that some students may be denied transportation due to insufficient funding. When money for transportation is scarce, the LEA must give priority to the lowest achieving students from low-income families.[21]

4. Duration of Choice Obligation

The obligation to provide a choice option, and transportation, lasts for as long as a school remains in improvement, corrective action or restructuring status.[22] A student who has exercised the choice option may remain in the new school until completing the highest grade it offers, even if his or her original school emerges from improvement, corrective action or restructuring status by making AYP for two consecutive years.[23] Under such circumstances, however, the LEA no longer need provide transportation.[24]

Issues and Implications for Students with Disabilities

It is clear that students with disabilities may not be left stranded in underperforming schools. As already noted, NCLB requires that (1) students with disabilities enrolled in Title I schools identified for "improvement" be offered the option to transfer whenever the school district is generally required to offer that option, and (2) the choice option offered provide FAPE.

Section 504 of the Rehabiitation Act of 1973 and Title II of the Americans with Disabilities Act would so require as a matter of equal opportunity and nondiscrimination, even if NCLB did not do so. Therefore, for example, where certain kinds of special education or related services have been centralized in a particular school – as some courts have permitted under certain circumstances – students receiving those services must be provided the option to transfer, *with appropriate services*, if that school is identified for improvement. The same would be true for students placed in separate classes within an underperforming school.

What is less clear are answers to many of the legal questions that will shape how the choice option created by NCLB works for students with disabilities. Three of the most critical are –

- Must a school district allow students with disabilities to transfer to the same school(s) that it has identified as the choice option(s) for students generally, or may a district deny a transfer to a particular school on the ground that needed services and supports are not available there, or that the school is otherwise incapable of providing a free appropriate public education?
- To what extent must the particular transfer options offered students with disabilities be comparable to those offered all other students?
- What is the role, if any, of the Individualized Education Program ("IEP") and placement team in deciding to which school a student may transfer once NCLB choice requirements have been triggered?

As the above discussion regarding basic choice provisions indicates, NCLB leaves school districts significant latitude in implementing the law's choice provisions. Parents interested in exercising a choice option on behalf of a child with a disability will encounter these critical questions in contexts *shaped by the details of local facts, local conditions and local implementation* of NCLB's choice provisions. Further, these locally- and family-specific situations will arise in a legal landscape made murky by the interplay among NCLB, the Individuals with Disabilities Education Act ("IDEA"),[25] and Section 504 of the Rehabilitation Act[26] and the Americans with Disabilities Act ("ADA").[27] There are, therefore, no clear and absolute answers to these three critical questions. It is possible, however, to identify basic legal principles that will apply when parents and advocates encounter those locally-specific facts, conditions and implementation issues.

Question 1 – Must a school district allow students with disabilities to transfer to the same school(s) that it has identified as the choice option(s) for students generally, or may a district deny a transfer to a particular school on the ground that needed services and supports are not available there?

Section 504 and the ADA, IDEA and NCLB will all come into play when this question arises. A blanket ban on students with disabilities – or students with a particular kind of disability – transferring to a particular school would probably violate Section 504 and the ADA, as would a requirement that students waive receipt of special education, related services or

accommodations in order to attend a particular school. Whether a refusal to serve or accommodate an individual student in a particular choice school (absent an unlawful blanket policy) violates these laws or their implementing regulations will depend upon the particular facts. Further Section 504 and ADA issues may arise when choice options offered students with disabilities are not comparable to those offered their peers without disabilities, as further discussed below.

IDEA probably does not prevent school districts from offering students with disabilities different choices than it offers other students in an underperforming school, provided that each student is offered a choice(s) that provides FAPE in the least restrictive environment and otherwise meets the requirements of the IDEA statute and regulations.[28] The U.S. Department of Education has interpreted NCLB as permitting districts to offer different choices, within limits. It's December 4, 2002 draft, non-regulatory guidance on school choice under NCLB states that "students with disabilities do not have to be offered their choice of the same schools as are offered to nondisabled students" but, rather, "[i]n offering choice to students with disabilities, school districts may match the abilities and needs of a student with disabilities to the possible schools that have the ability to provide the student FAPE."[29] The guidance also recognizes that the non-discrimination provisions of Section 504 and the ADA apply to school choice under NCLB.[30] These include, as the Department presumably would agree, the principles discussed above in regard to blanket provisions and individual accommodations, and those discussed below regarding comparability of choices.

Question 2 – To what extent must the particular transfer options offered students with disabilities be comparable to those offered all other students?

Section 504 and the ADA generally require public school systems to provide students with disabilities with benefits and services comparable to those provided their peers without disabilities. The regulations implementing Section 504 prohibit public school systems from affording qualified students with disabilities "an opportunity to participate in or benefit from...[an] aid, benefit or service that is not equal to that afforded others," providing "an aid, benefit, or service that is not as effective as that provided to others," or providing "different or separate aid, benefits, or services unless...necessary to provide...aid, benefits, or services that are as effective as those provided to others."[31] The ADA regulations contain the same prohibitions.[32] Both sets of regulations also make it illegal for school systems running programs to "utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped [sic] persons to discrimination on the basis of handicap [sic],[or] (ii) that have the...effect of defeating or substantially impairing accomplishment of the objectives of the...program with respect to handicapped [sic] persons...."[33]

There are many conceivable ways in which choice options offered students with and without disabilities might differ. Possibilities include, for example, distance from the school of origin, optional programs (academic and non-) available at the new school, course offerings, access to highly qualified teachers, school and class size, range of extra-curricular activities, quality of physical facilities and availability of before- and after-school child care. Whether

these or other differences violate Section 504 and ADA regulatory requirements regarding comparable benefits and services – in regard to either an individual student or students with disabilities collectively – will, of course, depend upon the particular facts.

Question 3 – What is the role, if any, of the IEP and placement team in deciding to which school a student may transfer once NCLB choice requirements have been triggered?

Both IDEA and the Section 504 regulations contain specific provisions dictating how, and by whom, placement decisions are to be made for students with disabilities. Chief among these is the requirement that all placement decisions be made by a group of persons (including the parent) knowledgeable about the child, the meaning of the evaluation data and the placement options.[34] This would appear to require some sort of team involvement in either selecting the transfer option(s) to be offered to a parent, or approving a parent's choice made from the options offered to all parents in the school – at least to the extent that transferring would constitute a "change in placement" under these laws. Whether a parent's exercise of a particular transfer option would constitute a "change in placement" will depend upon the particular circumstances and how the courts in the relevant jurisdiction have interpreted this term.

It is also significant that NCLB regulations require that the choice option offered a student with disabilities provide FAPE "as defined by IDEA or the section 504 regulations, as the case may be."[35] This suggests that as a matter of NCLB compliance, the school district must either ensure "up front" that the option(s) being offered will provide FAPE (which would seem to require IEP/placement team involvement) or ensure that the new school selected by the parent from the options offered will do what is required in order to deliver FAPE. In addition, the explicit reference to FAPE "as defined by IDEA" arguably incorporates the procedural aspects of FAPE as well as the substantive ones, thus requiring team involvement as an NCLB matter to the same extent that it would be required independently as an IDEA matter.

Conclusion

The 2003-2004 school year is only the second in which NCLB's limited public school choice provisions have been in effect. Hence, there is limited practical experience upon which to draw in understanding how this brand of choice is working for students with disabilities. Continued implementation on the local level will bring the issues and implications into sharper focus, and allow for the ongoing development and refinement of advocacy strategies.

E. Ordover
10/2003

NOTES

1. Pub. L. 107-110 (January 8, 2002).

2. See generally 20 U.S.C. §6311.

3. The law includes explicit provisions regarding meaningful participation in assessments by students with disabilities, and students who are English language learners. See 20 U.S.C. §6311(b)(3)(C)(ix); 34 C.F.R. §200.6 (2003).

4. 20 U.S.C. §6316(b)(1)(A).

5. For a further discussion of adequate yearly progress and the other consequences of a school's failure to make AYP, see the Center for Law and Education issue paper entitled "School-level Accountability Under the No Child Left Behind Act" (September 2003).

6. 20 U.S.C. §6316(b)(1)(E); 34 C.F.R. §200.44(a) (2003).

7. *Id.*; 34 C.F.R. §200.44(a)(3) (2003). "Corrective action" and "restructuring" are consequences that follow when a school identified for improvement continues to fail to make AYP; for a further discussion, see "School-level Accountability Under the No Child Left Behind Act," *supra* note 5. The criteria for finding a school to be "persistently dangerous" under the NCLB are set by the State in consultation with local educational agencies. *See* 20 U.S.C. §7912(a). Apart from the public school choice requirements that are the subject of this paper, a student who attends a "persistently dangerous" school, or becomes the victim of a violent criminal offense while at the public school he or she attends, must be allowed to attend a safe public school within the local educational agency. *See id.*

8. 20 U.S.C. §6316(b)(1)(E)(i); 34 C.F.R. §200.44(a)(5), (b) (2003).

9. *See* 34 C.F.R. §200.44(c), (d) (2003).

10. 34 C.F.R. §200.44(c)(3); U.S. Department of Education, *Public School Choice Draft Non-Regulatory Guidance* (December 4, 2002) (hereinafter "Draft Guidance") at 15.

11. 67 Fed. Reg. 71753 (12/2/02). The Department suggests, for example, "adding classes and hiring additional teachers so that the LEA can offer choices to students while adhering to State-mandated class size limits," and notes that an LEA is not required to make *every* school in the district available as a choice option but, rather, may take factors such as health and safety factors and transportation costs into account in deciding whcih schools to make available. See *id.* at 71754.

12. 20 U.S.C. §6316(b)(11). *See also* 34 C.F.R. §200.44(h) (2003).

13. *See* 34 C.F.R. §200.44(h)(2) (2003); Draft Guidance at 13.

14. 20 U.S.C. §6316(b)(1)(E)(ii).

15. 34 C.F.R. §200.44(j) (2003).

16. 20 U.S.C. §6316(b)(1)(F); 34 C.F.R. §200.44(f) (2003).

17. 20 U.S.C. §6316(b)(1)(E)(i) (2003).

18. 34 C.F.R. §200.44(a)(4)(i) (2003).

19. 34 C.F.R. §200.44(a)(4)(ii) (2003).

20. 20 U.S.C. §6316(b)(9), (10); 34 C.F.R. §200.44(i) (2003).

21. *See* Draft Guidance at 7, 18.

22. 20 U.S.C. §6316(b)(12); 34 C.F.R. §200.44(a)(1), (2) (2003).

23. 20 U.S.C. §6316(b)(13); 34 C.F.R. §200.244(g)(1) (2003).

24. 20 U.S.C. §6316(b)(13); 34 C.F.R. §200.244(g)(2) (2003).

25. 20 U.S.C. §1400 *et seq.*

26. 29 U.S.C. §794.

27. 42 U.S.C. §12101 *et seq.*

28.Note that under IDEA, the legal obligation to provide FAPE falls upon the state and LEAs, not the individual schools within the latter.

29. Draft Guidance at 14.

30. See Draft Guidance at 13 - 14.

31. 34 C.F.R. §§104.4(b)(1)(ii) - (iv) (2003).

32. *See* 28 C.F.R. §35.130(b)(1)(ii) - (iv) (2003).

33. 34 C.F.R. §104.4(b)(4) (2003) (Section 504 regulations). See also 28 C.F.R. §35.130(b)(3) (2003) (ADA regulations).

34. 20 U.S.C. §1414(f); 34 C.F.R. §§104.35(c), 300.501(c), 300.552(a) (2003).

35. 34 C.F.R. §200.44(j) (2003).